UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA
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GEOVANI DAVILA,
Petitioner,

v. CIVIL ACTION NO.
(Crim.#01cr018)

UNITED STATES OF AMERICA,
Respondent,

----------x

MEMORANDUM INSUPPORT OF MOTION
TO VACATE SENTENCE PURSUANT TO §2255

INTRODUCTION:

COMES NOW GEOVANI DAVILA, petitioner pro se at FCI Beckley, West Virginia, files this memorandum insupport of motion to vacate, set aside or correct sentence of a federal prisoner incustody.

BACKGROUND

On or about Janurary 17, 2001, petitioner was charged by way of an indictment in a heroin conspiracy that did not specify an amount, caused an overdose death under §846, §841(a)(1) and (b)(1)(C) 21 USC, in a single count that named no other person but petitioner only.

Petitioner was convicted by way of a plea of guilty to the single count and sentenced to 384 months, $11,109.66 restitution to Harold E. Eckley and $100 to Ariel Bohn both family of the victim, and $100 special assessment

fee imposed by the Honorable Sylvia H. Rambo, Judge, on or about February 8, 2002.

A direct appeal to the Third circuit was denied on or about March 27, 2003. No. 02-1446. And an application for certiorari to the Supreme court of the United States was also denied on or about October 6, 2003.

Petitioner was represented by counsel at some of the criminal process and at direct appeal.

No further action was taken in this case till this present §2255 petition.

JURISDICTION

The district court has jurisdiction pursuant to Section 2255 28 USC.

SUMMARY OF CLAIMS

1. Petitioner's plea was entered and accepted inviolation of his 5th amendment to due process and 6th amendment to charges of all elements that constitutes a crime in his indictment.

2. The sentence imposed by the court is inviolation of petitioner's 6th Amendment right not to exceed the statutory maximum charged, proven and submitted to the court or what he agreed and understood.

3. Petitioner's Sixth amendment to effective assistance of counsel was violated in counseling the guilty plea and failure to challenge the government's case.

4. Petitioner due process and sixth amendment was violated for admitting evidence of forensic autopsy

from a non expert and for failure to qualify the credentials and evidence handling and chain of command.

5. Petitioner's Sixth amdndment to counsel representation was violated during the removal hearing process held in Philadelphia in January 2001, also known as the Gideon violation.

6. The Mifflin County District Attorney was without jurisdiction to prosecute petitioner as a Special Asst. United States Attorney (SAUSA), because his appointment has expired.

7. The sentencing guidelines used in this case is unconstitutional.

8. The restitution imposed is invalid for failure to conform to the law.

9. Petitioner's plea is invalid because he did not hear and understood most of the proceedings admitted due to his hearing disability.

ARGUMENT

1. THE PLEA ENTERED INVIOLATION OF PETITIONER'S DUE PROCESS & 6th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In petitioner's indictment for which a plea was entered, charges inpart the following:

> 1. "Beginning on or about dates unknown to the Grand Jury . . . . the defendant . . . . along with individuals . . . knowingly and intentionally combined, conspired, . . . possess with intent to distribute, heroin, a schedule I controlled substance."

> 2. "In furtherance of this conspiracy and to attain the objects thereof the defendant . . . numerous distribution of heroin including a distribution of heroin on or about November 24, 2000, which distribution resulted in the death of an individual in Mifflin Pennsylvania as a result of the use of the heroin."
>
> "All inviolation of Title 21 USC ¶846, §841(a)(1) and (b)(1)(C)."

Petitioner argues that this charge he entered a plea of guilty is fundamentally defective to support the plea in two major ways. First, the charge failed to name the idividual whose death resulted by it. And second, it failed to specify an amount of heroin distributed that resulted in the death of the alleged individual. The petitioner contend that the individual's forensic autopsy report identified for which petitioner was convicted and sentenced did not and could not have died from an inditerminate amount of heroin which petitioner will assume is one (1) gram charged on or about November 24, 2000.

In United States v. Rebmann, 321 F.3d 540, 542 (6th Cir. 2003), the court held that "the "if death results" provisoin of 21 USC §841(b)(1)(C) is an element that must be proven beyond a reasonable doubt; it is not a sentencing factor to be determined by sentencing judge by a preponderance of the evidence." The recent Supreme court decision in Blakely v. Washington, U.S. No. 02-1632, 75 Crl 308 (2004), further goes to clarify

what "statutory maximum" meant, to mean what was reflected in the charge, found by the jury or what the defendant agreed to. In this instant case, "one" (1gm) gram of heroin; and definitely not the death of the "unnamed" individual not in charging papers as required in murder charges. Forensic autopsy report of the death of Joshua Woods could have been caused by drug overdose distributed by others, order than petitioner's "one" gram of heroin charged.

Further, the samples of the drug alleged to have caused death was not factually linked to petitioner to support the distribution and conspiracy of the heroin alleged to have resulted in death even though the forensic report "felt" the death was as a result of drug overdose which could have been any other type of drugs not charged in the indictment.

Therefore, petitioner's plea is involuntary, unintelligent and unknowingly entered into to support his guilty plea and sentence beyond a reasonable doubt. See, United States v. Garth, 188 F.3d 99, 106 (3rd Cir. 1999). Petitioner is factually and legally innocent of this conviction and sentence.

2. SENTENCE IMPOSED IS INVALID

In Blakely v. Washington, U.S. No. 02-1632, 75 Crl 284, 308 (2004), a case involving the kidnapping of his estranged wife in whch Blakely enters a plea of

guilty. Under the State law, the court imposed an "exceptional" sentence of 90 months after making a judicial determination that he had acted with "deliberate cruety." However, the Supreme court of the United States held that the facts admitted in his plea, standing alone, supported a maximum sentence of 53 months, siding with Blakely that the sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to sentence. The court reflected that it decision is based on two long standing tenents of common-law criminal jurisprudence: "that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors," citing, 4 W Blackstone, Commetaries on the laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common-law, and it is no accusation in reason," citing, 1 J. Bishop criminal procedure §87, p. 55 (2d ed. 1872).

The Blakely court clarified that the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts but the maximum he may impose without any additioal findings. When, a judge inflects punishment that the jury's verdict alone does not allow the jury has not found all the facts "which

the law makes essential to punishment," citing, Bishop, supra. §87 at 55, and the judge exceeds his proper authority. The court clearly spoke unequivocally that Blakely opinion is solely on how to implement and respect the Sixth Amendment at sentencing process. In taking that position, the court cites bizzare situations where with no warning in either his indictment or plea, a defendant would routinely see his maximum potential sentence baloon from as little as five years to as much as life imprisonment in 21 USC §841(b)(1)(A) (D), based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong. Blakely, supra.

In this instant case, the court imposed a sentence of 384 months to a charge of drug conspiracy that failed to specify an amount. Further, the charge also failed to named whose death the inditerminate drug amount caused his or her death. The principles of Blakely is not meant in the sentence imposed which petitioner argues violated his sixth amendment right. The factual basis of this case failed to establish a clear "nexus" of the heroin that caused overdose death to petitioner since no drug was recovered to match what the victim possess at death. In addition, petitioner did not have any contact with the victim at all on or about November 24, 2000. Petitioner denies any responsibility to the November 24, 2000 heroin

distribution and he now claims as maintained to counsel during the criminal process that he is innocent of that very sale of November 24, 2000.

3. INEFFECTIVE ASSITANCE OF COUNSEL INTO PLEA OF GUILTY COUNSELING

The federal courts has laid out a well established standard of ineffectiveness of counsel which requires petitioner to show (1) that the representation fell below an objective standard of reasonableness measured by prevailing professional norms; and (2) prejudice. See, Strickland v. Washington, 466 US 668 (1984). The courts define the existence of prejudice where a petitioner can show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The standard the court acknowledges applies to claims arising in the context of guilty pleas. See, Hill v. Lockhart, 474 US 52 (1985), United States v. Nahodil, 36 F.3d 323, 326 (3rd Cir. 1994).

In this instant case, petitioner argues that he would not have entered into a plea of guilty if not for counsel's ill-advise and misleading informations about the facts and sentence petitioner faces.

First, counsel failed to explain to petitioner that for him to be convicted, the government is required to prove beyond a reasonable doubt that the inteterminate

heroin alleged to have been distributed caused death. The name of the alleged dead person was required to be in the charge, proven and submitted to the jury. In order words, two most important elements here are required to find guilt, which is the amount of heroin sold and the person's name petitioner is alleged to have sold to that caused his or her death. Because this two important elements were missing in the charge, petitioner's conviction is invalid and counsel's advise to a plea of guilty was ill-advised.

Petitioner informed counsel that he did not participate in the alleged November 24, 2000, sale of heroin to any one and petitioner had an alibi to support his whereabout as at the time the alleged sales was consumated. Counsel failed to follow the lead and investigate petitioner's claims. See, Kubat v. Thieret, 867 F.2d 351, 360 (7th Cir. 1989). Instead, counsel misled petitioner by saying that it does not matter whether or not he directly conducted that November 24, 2000 sale, so long as he was involved in prior sales. Petitioner's position was supported because after his arrest and detention in this case, drug activities was still ongoing between the Lewistown drug addicts and the Philadelphia drug sellers. (sse, sentencing trancripts at 12):

> MR THORNTON: Your Honor, I think it needs to remembered though that Mr. Davila

> has never been to Lewistown . . . It is even my understanding that after Mr. Davila was arrested, the people from Lewistown continued to call the telephone number that had been assigned to Mr. Davila.

Sentencing Transcripts at 14:

> THE DEFENDANT: Your Honor . . . And by me being incarcerated, these people are still going down there to get the stuff which I am truly sorry for what happened.

In addition, petitioner explained to counsel that his girl friend, Justina Rodriguez cell phone had been missing within the period of time of this alleged drug sales which counsel himself acknowledged that petitioner did not transact. (Plea transcripts at 18)

> MR. THORNTON: Your Honor, . . . It was not obviously an intentional act on Mr. Davila's part that these people overdosed, but he certainly did not sell the heroin that caused this.
> THE COURT: There was an intent to at least sell the heroin?

Petitioner contend that the alleged charge accused him of selling heroin that caused overdose death and not "an intent" to do so. See, Bailey v. Undited States, 133 L.Ed 2d 472 (1995), where the court held that "actual"

use is required to convict as in here "actual sales is also required to convict and not an "intent."

Further, counsel failed to test the government's forensic autopsy report by looking into the qualification and certification of the lab and it testing process and personnel. Counsel permitted the district attorney that was acting as a special assistance United States attorney to present the forensic autopsy report, without a formal qualification as an expert on that field. Counsle did not even question the District Attorney's appointment as a Special Assistance United States Attorney (SAUSA), whose terms may have expired during petitioner's prosecution. See, United States v. Navarro, 959 F.Supp. 1273 (E.D.Cal. 1997).

4. DISTRICT ATTORNEY NOT QUALIFIED AS FORENSIC AUTOPSY EXPERT

In Veloso v. Western Bedding Supply Co. Inc., 281 F.Supp.2d 743, 749 (D.N.J. 2003), the court held that under the Third circuit, three requirements must be met to qualify as an expert in the field of testimony which the court held as follows: (1) the witness must be qualified as an expert; (2) the expert must testify about matters requiring scientific, technical or specialized knowledge; and (3) the expert's testimony must assist the trier of facts.

In this instant case, at petitioner's change of plea hearing on June 20, 2001, Mr. Snook, who is the

District Attorney of Mifflin County and a Special Assistant United Attorney, presented the forensic autopsy report without qualification as an expert in forensic medicine nor as the expert that done the testing procedure. (see, plea hearing at 15). The court relied on this testimony to convict and sentence petitioner accordingly inviolation of his constitutional right to be convicted on a valid evidence that meets constitutional standards.

5. GIDEON VIOLATION

In Gideion v. Wainwright, 372 US 335 (1963), the court held that the Sixth Amendment provides, "in all criminal prosecution, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." 372 US at 340. This right the federal court has recognized applies to all stages of the proceeding.

In this instant case, petitioner argues that he was not represented by counsel at the removal proceeding in Philadelphia in January 24, 2001, at the Eastern district of Pennsylvania. If counsel was appointed to represent petitioner in that proceeding, petitioner has no recollection which has resulted in the illegal waiver to challenge his charges that was pending in the Middle district of Pennsylvania. In that hearing, the alleged sealed indictment was for an unknown "John Dow" who petitioner believes is not him since the records of this case shows now that drug activities were still

ongoing after his arrest and detention between the Lewistown drug addicts and the drug sellers in Philadelphia. Petitioner has been used as the "fall guy" in this alleged drug sale of November 24, 2000, that he has no knowledge or was involved.

6. MIFFLIN COUNTY DA LACK JURISDICTION TO PROSECUTE

In United States v. Navarro, 959 F.Supp. 1273, 1278 (E.D. Cal. 1997), the court held that the SAUSA, may be appointed for a period not exeeding four years for work of mutual concern to that agency and the local government. See, 5 USC §3372(a). The statute provide in part that such assignment may not exceed two years at a time which can be extended once by the head of the federal agency for not more than two additional years. 5 USC §3372(a)(2).

In this instant case, petitioner's investigation has disclose that Mr Snook, the SAUSA has exceeded the mandate of his prosecutorial duties during petitioner's case. Because the error is jurisdictional, it is not waived even though no objection was made during the prosecution. Therefore, petitioner move this court to conduct an evidentiary hearing to determine petitioner's claims including the production of Mr. Snook's appointment papers and official oath of office administered dates.

7. The recent Supreme Court decision in **Blakely v. Washington** and **United States v. Booker** must be applied in the instant matter.

A. The Federal Guidelines applied at the Petitioner's sentencing were unconstitutional.

In the instant case, the Petitioner was sentenced under federal sentencing guidelines that the United States Supreme Court has since ruled are unconstitutional. The Petitioner submits, this Court has also recently concluded that the federal sentencing guidelines are unconstitutional. Specifically, in **Blakely v. Washington**, the Supreme Court clarified the meaning of "statutory maximum" sentence to mean "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant". In addition, the High Court concluded that a sentence imposed by a judge by enhancing additional points is invalid. Upon that background, several federal courts have ruled that the federal sentencing guidelines were unconstitutional, including **United States v. Booker**, 7th Cir. Case No. 03-4225 (159 L.Ed.2d 838); **United States v. Montgomery**, 6th Cir. Case No. 03-5256; and **United States v. Croxford**, D. Utah, Case No. 02-CR-00302, 75 Crl 469 (2004). As an initial matter, the Petitioner notes that in his previous motion pursuant to Title 28 U.S.C. § 2255, an issue was raised under the banner of **Blakely/Apprendi** that the Petitioner's sentence was improper because it violated the holding in **Blakely v. Washington**. The Petitioner's argument made no mention of the announcements that later came in **United**

States v. Booker. However, in respect to the Petitioner's previous § 2255 motion, this Court ordered that:

> At the present time, the Supreme Court has not declared the United States Sentencing Guidelines unconstitutional, although the issue is pending. Until such time as the Supreme Court rules on this issue, as well as whether any decision on this issue is retroactive and available to raise on collateral review, the petitioner is premature.

The Court further stated in the Order that:

> 1) The petition for Writ of Habeas Corpus filed pursuant to Title 28 U.S.C. § 2255 is dismissed without prejudice to refile at the appropriate time.
>
> 2) Defendant's motions for appointment of counsel and private investigator, and to request discovery are dismissed as moot.

The Petitioner submits, the Supreme Court has now declared the United States Sentencing Guidelines unconstitutional in light of **Blakely** and **Booker**, therefore in light of this Court's earlier invitation to refile at the appropriate time, the Petitioner now puts forth the instant motion under § 2255 asking that all claims previously put forth in addition to his **Blakely** and **Booker** claims be considered as well. The Petitioner offers the following legal averments in support of (A) Ground One and (B) Ground Two in the attached pre-printed § 2255 form motion.

The United States Constitution guarantees each defendant a trial by jury wherein no punishment is imposed until a jury determines the defendant guilty of particular conduct beyond a reasonable doubt. See United States Constitution, Amendments

Five and Six. At odds with that system is the Sentencing Reform Act of 1984, which sets up a system that appears to allow a district court to sentence or punish a defendant based upon conduct that is not admitted or proven beyond a reasonable doubt. (Title II of The Comprehensive Crime Control Act of 1984); U.S.S.G. Chapter 1, Part A, intro., comment (3).

In addition to a base sentencing range established by reference to the jury verdict alone, the guidelines prescribed enhanced sentencing ranges based on sentencing factors that are determined by a judge after trial, by a preponderance of the evidence. U.S.S.G. Chapter 1, Part A, introduction, comment (2) and (4)(a). In his dissent in **Harris v. United States**, 122 S.Ct. 2406, 153 L.Ed.2d 524 (200), Justice Thomas reminded us that due process requires that every fact necessary to constitute a crime must be found beyond a reasonable doubt by a jury if that right is not waived. **Id.** at 2424 (Thomas, J., dissenting), citing **In re Winship**, 397 US 358, 364, 25 L.Ed.2d 368, 90 S.Ct 1068 (1970). Society has long recognized a necessary link between punishment and crime. **Harris**, 122 S.Ct. 2424 (Thomas, J., dissenting), citing **Apprendi v. New Jersey**, 530 US 466, 478, 120 S.Ct. 2348 (2000) ("The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime"). "Why, after all, would anyone care if they were convicted of murder, as opposed to manslaughter, but for the increased penalties

for the former offense, which in turn reflect the greater moral opprobrium society attaches to the act?" **Harris**, 122 S.Ct. at 2424 (Thomas, J., dissenting).

Recognizing this fundamental defect in the manner in which criminal defendants were sentenced, the Supreme Court sought to remedy the situation through its ruling in **Apprendi v. New Jersey.** In **Apprendi**, the Court stated that if a statute annexes a higher degree of punishment based on certain circumstances, exposing a defendant to that higher degree of punishment requires that those circumstance be charged in the indictment and proven beyond a reasonable doubt. **Apprendi**, 530 US at 480 (quoting J. Archbold, **Pleading and Evidence in Criminal Cases 51** (15th Ed. 1862)). More succinctly, the Court stated that "other than the fact of a prior conviction, any fact that increases the penalty for crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." **Apprendi** 530 US at 490 (2000). In **Ring v. Arizona**, 536 US 584 (2002), the Supremee Court clarified and reaffirmed this rule. The **Ring** holding is straightforward and clear-cut: The **Apprendi** rule applied to any aggravating fact necessary to expose a defendant to punishment beyond an otherwise mandatory statutory limit. **Id.** As recently observed by the United States District Court for the District of Massachusetts regarding the Sentencing Guidelines, "the Sizth Amendment guarantee of trial by jury has been eroded as never before in the history of our nation while the institutional judiciary complacently slips into forms of expression and modes of thought that unconsciously reinforce the Department agenda in a powerfully

Orwellian way. **United States v. Green**, 2004 U.S. Dist. LEXIS 11292, *13 (D. Mass. 2004).

After **Apprendi**, the various courts throughout the country assumed the term "statutory maximum" referred to in **Apprendi** and **Ring** was the maximum sentence set forth under the statute listed in the indictment. The courts have assumed that the term "statutory maximum" does not apply to the various sentencing thresholds establised under federal sentencing guidelines.

In **United States v. Promise**, 255 F.3d 150 (4th Cir. 2001), the Fourth Circuit clearly sets forth a summery of its post-**Apprendi** holdings, stating that an indictment must state any fact that increases a penalty beyond the proscribed statutory maximum must be submitted to a jury for proof beyong a reasonable doubt. Furthermore, for convictions pursuant to Title 21 U.S.C. § 841(a) drug quantity was an element of the offense that needs to be submitted for proof beyond a reasonable doubt. **Id** at 152.

The Supreme Court's decision in **Blakely v. Wasington**, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) further extended the **Apprendi** decision, indicating that this circuit has been incorrect in limiting **Apprendi** to merely mean that drug amounts must be listed in an indictment and that the statutory maximum does not refer to the Sentencing Guidelines, instead holding that "the 'statutory maximum' for **Apprendi** purposes in the maximum

sentence a judge may impose **solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.** When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment". **Blakely v. Wasington**, 124 S.Ct. at 2537 (emphasis in original).

The Court noted that the rule announced in **Apprendi** reflected two longstanding tenets of common-law criminal jurisprudence: "that the truth of every accusation against the defendant should afterwards be confirmed by a unanimous [jury verdict], and that an accusation which lacks any particulary fact which the law makes essential to the punichment is ... no accusation within the requirements of the common law and it is no accusation in reason." **Id.** The Court then noted the principle in American jurisprudence that "every fact which is legally essential to the punishment" must be charged in the indictment and proved to a jury. **Id.**

The Petitioner submits that compliance with the Six Amendment requires "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" to be proved beyond a reasonable doubt. **Apprendi**, 530 US at 490. The prescribed "'statutory maximum' for **Apprendi** purposes is the maximum sentence a judge may impose solely on the basis of the fact reflected in the jury verdict or admitted by the defendant. **Blakely**, 124 S.Ct. at 2536. The jury verdict alone - or the defendant's admission

alone - "must authorize the sentence." **Id.** Therefore, the upper bound of the appropriate guideline range, based on facts proven to a jury beyond a reasonable doubt or admitted by the defendant, establishes the relevant statory maxiumum for **Apprendi** purposes. Under the federal Sentencing Guidelines, drug amounts, enhancements based on a specific offense characteristic, and upward departures all have the same effect - namely, the all **increase** the maximum permissible sentence under the guidelines. A judge's reliance on such factors at sentencing is therefore unconstitutional.

The aforementioned argument based upon the Court's decision in **Blakely** was further bolstered by the recent decision issued in **United States v. Booker**, 125 S.Ct. 738 (2005). In **Booker**, the Court ruled that the federal Sentencing Guidelines were not mandatory in issuing federal sentences, but are to be used merely as an advisory tool. **Id.** at 745. The decision flowed from Justice Stevens' worry that as sentencing enhancements found only by a judge by a preponderance of the evidence became greater, "the jury's finding of the underlying crime became less significany". **Id.** at 751. As such, the Sixth Amendment right to a jury trial was being usurped, requiring change in order to preserve "Sixth Amendment substance". **Id.** Furthermore, the Court again reiterated its commitment to the ideal that any fact other than a prior conviction which is neccessary to support a sentence exceeding the statutory maximum authorized by the jury's finding must be proved to a jury beyond a reasonable

doubt. **Id.** at 754-55. Importantly, the main tenet at issue in this matter, that the prescribed "'statutory maximum' for **Apprendi** purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant", is not a new rule of constitutional law but a rule that was formulated in **Apprendi. Booker**, 125 S.Ct. at 754-55. However, through the unwillingsness of circuit court's to apply this rule, clarifying decisions such as **Blakely** and **Booker** have been issued. As such, the Petitioner was clearly sentenced improperly and must now be sentenced according to the precepts of **Apprendi** as the Petitioner was sentenced well after **Apprendi** was decided.

Since the **Booker** decision, this circuit has held that defendants whose sentences have been increased due to Guideline factors not submitted for proof beyond a reasonable doubt to a jury have been entitled to a re-sentencing to conform with the decision issued in **Blakely** and **Booker. United States v. Iskander**, 205 US App. LEXIS 8069 (3rd Cir. 2005). Specifically, the defendant in **Iskander** had been sentenced based upon judicially determined guideline factors, such as the use of "sophisticated means", that were not submitted to a jury for proof beyond a reasonable doubt. **Id.**

In the instant case, the Petitioner was sentenced upon drug amounts that were not charged in the indictment, the plea

agreement the Petitioner signed reflected a thirty (30) year sentence without a specific amount of heroin stated, agree to, proven and/or submitted to reflect amount that allegedly caused death in this case. Similarly, in the instant case, the sentence of 384 months was imposed solely and unilaterally by the District Court in violation of **Blakely v. Washington** and **United States v. Booker**, in that, the enhancements relied on by the District Court was conduct not charged in the indictment nor plead to by the Petitioner. See **Pre-Sentencing Report.** The Petitioner agreed to plead guilty to count one of the indictment which charged the Petitioner with a violation of Title 21 U.S.C. § 846, conspiracy to distribute heroin and possession with intent to distribute heroin a schedule I controlled substance. As a result the remaining count two was dismissed. However, the Petitioner was sentenced upon a base offense level pursuant to U.S.S.G. § 2D1.1(a)(2) which provides for convictions under Title 21 U.S.C. § 841(b)(1)(C) which in turn prescribes punishment under paragraph (c) where the offense of conviction establishes that death or serious bodily injury resulted from the use of a controlled substance in schedule I or II. The Petitioner submits that the only crimes which he was charged with in count one and could possibly have plead to in count one involved an unquantified amount of heroin. As death or serious bodily injury were not alleged in count one and no drug amounts were submitted, plead to, proved to a jury or a finder of fact beyond those charged in the indictment, no sentence could be based

upon such elements as drug amounts, increased drug amounts, death or seruous bodily injury. Furthermore, enhancements such as the firearm enhancement were not submitted for proof beyond a reasonable doubt and norwas it plead to making it's use in sentencing the Petitioner improper. The two point level increase is improper.

Accordingly, as the Petitoner's sentence has been imposed in violation of his constitutional rights to a jury trial and due process of law, the instant sentence must be vacated and this matter remanded for re-sentencing consistent with the findings of this court and the constitutional principles embodied in the Fifth and Sixth Amendments.

8. Restitution was imposed in violation of the law.

This Court at sentencing imposed a restitution in the amount of $11,109.66 and $100.00 for the victim's family. This financial restitution was imposed without a proper finding as to whether or not the Petitioner is capable of making such payment.

In **United States v. Siegel**, 153 F.3d 1256, 1261 (11th Cir. 1998), the court held that the court is required to satisfy a defendant's financial ability to pay fine or restitution before the imposition of such penalty. The court's failure to conduct a proper finding into the Petitioner's financial

ability was in violation of the Petitioner's Due Process right in a sentence resulting in violation of his Eighth Amendment right to excessive punishment.

9. The Petitioner's disability impaired his ability to hear and understand the plea and sentencing proceedings.

At the change of plea hearing held June 20, 2001, and the sentencing of February 9, 2002, the records make no secrets about the hearing problems this Petitioner experienced in the entire hearing proceedings. This Court was put on notice several times by the Petitioner and his counsel that he could not hear and follow the Court proceedings properly. In most cases, the Petitioner's response was based on his counsel's gestures after a question is put accross or statement made by the Court. Although a hearing aid was later given to the Petitioner which did not do much good either to assist him in hearing properly and understanding the Court proceedings. In fact, it was as if the Petitioner was prosecuted in absential.

As a result of this hearing disability and impairement, the Petitioner was unable to object to several incriminating allegations in this case and properly defend against them. This problems the Petitioner believes is in violation of his Due Process right to the Fifth Amendment of the United States Constitution and the Sixth Amendment to self incrimination.

CONCLUSION

For the reasons stated, relief should be granted, vacating sentence or in the alternative hold an evidentiary hearing to develop the records further before granting the Petitioner Habeas Corpus relief.

Respectfully submitted,

Date: July 14, 2005

Geovani Davila

Geovani Davila, Pro Se

Reg. No. 54826-066
FCI Gilmer
P.O. Box 6000
Glenville, WV 26351-6000

CERTIFICATION

STATE OF WEST VIRGINIA)
)
COUNTY OF GILMER)

I hereby certify that under the penalty of perjury the statements contained herein is true and correct, pursuant to Title 28 U.S.C. § 1746.

Executed and sworn to on this 14 day of July 2005.

By: Geovani Davila
Geovani Davila

PROOF OF SERVICE

I certify that on July 14 - 2005 (date) I mailed a copy of this brief and all attachments via first class mail to the following parties at the addresses listed below:

Gordon A.D. Zubrod
Assistant US Attorney
Federal Bldg. Room 217
228 Walnut Street
Harrisburg, PA 17108.

PROOF OF SERVICE FOR INSTITUTIONALIZED OR INCARCERATED LITIGANTS

In addition to the above proof of service all litigants who are currently institutionalized or incarcerated should include the following statement on all documents to be filed with this Court:

I certify that this document was given to prison officials on 7-14-2005 (date) for forwarding to the Court of Appeals. I certify under penalty of perjury that the foregoing is true and correct. 28 U.S.C. §1746.

Giovanni Davila
Signature

Dated: July 14 2005